"Automatic" Waiver of Family Division Jurisdiction

Chapter 22

Summary of Contents

22.1 "Automatic" Waiver

MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), provides that the Family Division has exclusive original jurisdiction over juveniles under 17 years of age who are found within the county and who have been found to have violated a municipal ordinance, state law, or federal law. However, the Family Division has jurisdiction over a juvenile 14 years of age or older who is charged with a "specified juvenile violation" only if the prosecutor files a petition in the Family Division instead of authorizing a complaint and warrant and proceeding in a court of general criminal jurisdiction. In such cases, the court of general criminal jurisdiction has jurisdiction to hear and determine the "specified juvenile violation." MCL 600.606(1); MSA 27A.606(1), and MCL 764.1f(1); MSA 28.860(6)(1).*

*See also Sections 2.7 (jurisdiction in "automatic" waiver cases) and 3.1 – 3.2 (taking custody of juvenile).

A. Specified Juvenile Violations

Specified juvenile violations are:

- burning a dwelling house, MCL 750.72; MSA 28.267;
- assault with intent to murder, MCL 750.83; MSA 28.278;
- assault with intent to maim, MCL 750.86; MSA 28.281;
- assault with intent to rob while armed, MCL 750.89; MSA 28.284;
- attempted murder, MCL 750.91; MSA 28.286;
- first-degree murder, MCL 750.316; MSA 28.548;
- second-degree murder, MCL 750.317; MSA 28.549;
- kidnapping, MCL 750.349; MSA 28.581;
- first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2);

- armed robbery, MCL 750.529; MSA 28.797;
- carjacking, MCL 750.529a; MSA 28.797(a);
- bank, safe, or vault robbery, MCL 750.531; MSA 28.799;
- manufacture, sale, or delivery, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), or possession, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i), of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine;
- first-degree home invasion, MCL 750.110a(2); MSA 28.305a(2), if armed with a dangerous weapon;
- assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, if armed with a dangerous weapon;
- escape or attempted escape from a medium- or high-security juvenile facility operated by the Family Independence Agency, or a high-security facility operated by a private agency under contract with the Family Independence Agency, MCL 750.186a; MSA 28.383a;
- any attempt, MCL 750.92; MSA 28.287, solicitation, MCL 750.157b; MSA 28.354(2), or conspiracy, MCL 750.157a; MSA 28.354(1), to commit any of the above crimes;
- any lesser-included offense of the above offenses arising out of the same transaction; and
- any other violation arising out of the same transaction if the juvenile is charged with one of the above offenses.

MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), MCL 600.606(2); MSA 27A.606(2), and MCL 764.1f(2); MSA 28.860(6)(2).

B. "Dangerous Weapon" Defined

"Dangerous weapon," as used in the context of a specified juvenile violation, is defined as:

- a loaded or unloaded firearm, whether operable or inoperable;
- a knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon;
- an object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon, or carried or possessed for use as a weapon; and
- an object or device that is used or fashioned in a manner to lead a person to believe the object or device is a weapon.

MCL 712A.2(a)(1)(B); MSA 27.3178(598.2)(a)(1)(B), MCL 600.606(2)(b); MSA 27A.606(2)(b), and MCL 764.1f(2)(b); MSA 28.860(6)(2)(b).

C. Prosecutorial Discretion

The "automatic" waiver procedure does not violate the separation of powers doctrine of Const 1963, art 3, § 2. *People v Black*, 203 Mich App 428, 429–30 (1994).

Whether to proceed in the Family Division or Criminal Division of Circuit Court on an enumerated offense is a matter of prosecutorial discretion. A prosecutorial policy to authorize complaints and warrants in all cases involving juveniles charged with first- and second-degree murder does not violate due process or represent an abuse of prosecutorial discretion. *People v Rode*, 196 Mich App 58, 65–66 (1992), rev'd on other grounds 447 Mich 325 (1994).

The probate court (now the Family Division of the Circuit Court) did not abuse its discretion in dismissing a petition on the prosecutor's motion, where the prosecutor immediately filed a complaint under the "automatic" waiver statute. There was no denial of due process or bad faith on the part of the prosecutor, as the juvenile was neither detained nor prejudiced by any delay, and the prosecutor dismissed the petition based on the seriousness of the offenses, newly discovered evidence, and a belief that the offenses were part of a conspiracy. *People v Dilling*, 222 Mich App 44, 47–50 (1997).

22.2 Special Adjournment for Cases Involving "Life Offenses"*

*See Sections 7.8 – 7.20 for a discussion of preliminary hearings.

*See Form MC 309.

The Family Division may grant special adjournments* when the juvenile is between 14 and 17 years of age and is alleged to have committed a specified juvenile violation. See MCR 5.935(A)(3).

NOTE 1: MCR 5.935(A)(3), which was adopted in 1988, has not been amended to reflect the legislative changes made to the "automatic" waiver statutes. In 1996, the Legislature increased the number of offenses eligible for "automatic" waiver from "life offenses" to "specified juvenile violations," and lowered the age of eligibility from 15 years to 14 years. See 1996 PA 255 and 260, effective January 1, 1997, amending MCL 600.606(2); MSA 27A.606(2), and MCL 764.1f(2); MSA 28.860(6)(2). Therefore, the "special adjournments" referred to in MCR 5.935(A)(3) should be made available to the prosecuting attorney whenever a juvenile over 14 years of age is charged with a specified juvenile violation.

The court, upon the request of the prosecuting attorney, shall adjourn the preliminary hearing for up to five days to give the prosecuting attorney an opportunity to determine whether to authorize the filing of a warrant and complaint in district court. MCR 5.935(A)(3)(a).

*See Chapters 16 – 21 (designated proceedings) and Chapter 24 ("traditional" waiver).

MCR 5.935(A)(3)(b)–(c) add that during the special adjournment, the Family Division must defer a decision as to whether to authorize the filing of a petition and must release the juvenile pursuant to MCR 5.935(C) or detain the juvenile pursuant to MCR 5.935(D). If, at the resumption of the preliminary hearing, the prosecutor has not authorized the filing of a warrant and complaint, the Family Division must proceed with the hearing, but this rule does not preclude the prosecutor from seeking a "traditional" waiver of the court's jurisdiction under MCR 5.950 (if the petition is authorized), or from designating the case under MCR 5.951(A)(3)(a).*

NOTE 2: If the prosecuting attorney files a complaint and warrant in district court, an arraignment must be held, and following the arraignment, the district court must set a date for the juvenile's preliminary examination within the next 14 days. The period consumed by the special adjournment, *up to three days*, must be deducted from the 14 days allowed for conduct of the preliminary examination following arraignment. MCR 6.907(C).

22.3 Court Rules That Apply to "Automatic" Waiver Proceedings in District and Circuit Courts

Following the filing of a complaint and warrant in district court, the rules in Subchapter 6.900 take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders. MCR 6.901(A).

MCR 6.901(B) provides that the rules in Subchapter 6.900 apply to proceedings in the district court and circuit court concerning a juvenile against whom the prosecuting attorney has authorized the filing of a criminal complaint and warrant charging an enumerated "life offense" instead of approving the filing of a petition in the juvenile court.

*See Chapter 24.

The rules do not apply to cases where there has been a "traditional" waiver of jurisdiction over the juvenile pursuant to MCL 712A.4; MSA 27.3178(598.4). MCR 6.901(B).*

NOTE: The court rules in Subchapter 6.900, which were adopted in 1989, have not been amended to reflect the 1996 legislative changes made to the "automatic" waiver statutes. See the Note 1 to Section 22.2, above. Consequently, the court rule provisions in Subchapter 6.900 state that they apply to "life offenses" committed by juveniles between 15 and 17 years of age, rather than "specified juvenile violations" committed by juveniles between 14 and 17 years of age. See MCR 6.903(D) and 6.903(H) (definitions of "juvenile" and "life offenses"). Although the applicable court rules have not been amended, the discussion throughout the rest of this chapter and Chapter 23 assumes that the court rules in Subchapter 6.900 should apply whenever a juvenile is charged as an adult pursuant to the requirements of the "automatic" waiver statutes in effect at the time of the juvenile's offense. As of January 1, 1997, this means juveniles between 14 and 17 years of age who have been charged with a "specified juvenile violation." See MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), MCL 600.606(1); MSA 27A.606(1), and MCL 764.1f(1); MSA 28.860(6)(1).

22.4 Right to Counsel

If the juvenile is not represented by an attorney, the magistrate or court must advise the juvenile at each stage of the criminal proceedings of the right to the assistance of an attorney. If the juvenile has waived the right to an attorney, the court at later proceedings must reaffirm that the juvenile continues to desire to proceed without being represented by an attorney. MCR 6.905(A). See also MCR 6.005(E) (if adult defendant previously waived assistance of lawyer, at subsequent proceedings the record "need show only that the court advised defendant of continuing right to attorney's assistance (at public expense if the defendant is indigent) and the defendant waived that right").

A. Appointment of Counsel

The court must appoint an attorney to represent the juvenile unless counsel has been retained or the juvenile has waived the right to an attorney. MCR 6.905(B).*

*See Form MC 222.

B. Waiver of Right to Counsel

Under MCR 6.905(C)(1)–(5), the magistrate or court may permit waiver of the right to counsel if:

(1) an attorney is appointed to give the juvenile advice on the question of waiver;

(2) the magistrate or court finds that the juvenile is literate and competent to conduct a defense;

(3) the magistrate or court advises the juvenile of the dangers and disadvantages of self-representation;

(4) the magistrate or court finds on the record that the waiver is voluntarily and understandingly made; and

(5) the court appoints standby counsel to assist the juvenile at trial and at the juvenile sentencing hearing.

See MCR 6.005(D), *People v Anderson*, 398 Mich 361 (1976), and *People v Riley*, 156 Mich App 396, 398–401 (1986) (advice required for adult criminal defendants).

C. Costs

The court may assess costs of legal representation, in whole or in part, against the juvenile, a person responsible for the support of the juvenile, or both. An order assessing costs shall not be binding on a person responsible for the juvenile's support unless an opportunity for a hearing has been given and until a copy of the order is served on the person, in person or by first-class mail, to the person's last-known address. MCR 6.905(D).

22.5 Arraignments in District Court

*See Sections 3.1 – 3.2 for a detailed discussion of obtaining custody of juveniles in "automatic" waiver cases.

When the prosecuting attorney authorizes the filing of a complaint and warrant charging a juvenile with a specified juvenile violation instead of approving the filing of a petition in juvenile court, the juvenile in custody must be taken to the magistrate for arraignment on the charge.* The prosecuting attorney must make a good-faith effort to notify the parent of the juvenile of the arraignment. MCR 6.907(A).

A. Time Requirements for Arraignments

The juvenile must be released if arraignment has not commenced:

(1) within 24 hours of the arrest of the juvenile, or

(2) within 24 hours after the prosecuting attorney authorized the complaint and warrant during special adjournment pursuant to MCR 5.935(A)(3), provided the juvenile is being detained in a juvenile facility.

MCR 6.907(A)(1)–(2).

*See Section 22.6, below, for a discussion of places of confinement.

"Juvenile Facility" is defined as an institution or facility operated by the court, a state institution or agency, or a county facility or institution other than a facility designed or used to incarcerate adults. MCR 6.903(G).*

B. Arraignment Procedures

At the arraignment on the complaint and warrant, the magistrate:

(1) must determine whether a parent, guardian, or adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the magistrate appoints an attorney to appear at arraignment with the juvenile or an attorney has been retained and appears with the juvenile.

(2) must set a date for the juvenile's preliminary examination within the next 14 days, less time given and used by the prosecuting attorney under special adjournment pursuant to MCR 5.935(A)(3), up to three days credit. Thus, the period consumed by the special adjournment, *up to three days,* must be deducted from the 14 days allowed for conduct of the preliminary examination following arraignment. The magistrate must inform the juvenile and the parent, guardian, or adult relative, if present, of the preliminary examination date. If a parent, guardian, or adult relative is not present, the court must direct the attorney for the juvenile to advise a parent or guardian of the juvenile of the scheduled preliminary examination date.

MCR 6.907(C)(1)–(2).

C. Setting of Bail at Arraignments

Unless detention without bail is allowed, the magistrate or court must advise the juvenile of a right to bail as provided for an adult accused. See US Const, Am VIII, Const 1963, art 1, § §15, 16 (excessive bail, bailable offenses), MCR 6.106, MCL 765.6; MSA 28.893 (pretrial release of adult criminal defendants), and MRE 1101(b)(3) (rules of evidence inapplicable in bail proceedings). The magistrate or court may order a juvenile released to a parent or guardian on the basis of any lawful condition, including that bail be posted. MCR 6.909(A)(1).*

*See Forms MC 240 and 241.

If the proof is evident or if the presumption is great that the juvenile committed the offense, the magistrate or the court may deny bail to a juvenile charged with:

(a) first-degree or second-degree murder, or

(b) first-degree criminal sexual conduct or armed robbery if:

(i) the juvenile is likely to flee, or

(ii) the juvenile clearly presents a danger to others.

MCR 6.909(A)(2)(a)–(b).

22.6 Places of Confinement for Juveniles Charged Under the "Automatic" Waiver Statute*

*See also Section 3.13 for a table summarizing places of detention for juveniles.

A. Places of Confinement Pending Arraignment

If the prosecutor has authorized the filing of a complaint and warrant, instead of approving the filing of a petition in the Family Division, a juvenile may, following apprehension, be detained pending arraignment:

(1) in a juvenile facility operated by the county;

(2) in a regional juvenile detention facility operated by the state; or

(3) in a court-operated facility with the consent of the Family Division or an order of a court as defined in these rules.

MCR 6.907(B)(1)–(3).

The juvenile placed in a detention home operated by the Family Division pending a decision by the prosecuting attorney to authorize the filing of a complaint and warrant in district court may remain there, with the Family Division's consent, even after the prosecuting attorney's decision to proceed under the "automatic" waiver statute.* Under MCR 6.907(B)(3), however, if the Family Division does not consent, or if the circuit court does not order the juvenile to remain in the court-operated

*See Section 3.1, Note.

facility, the juvenile must be moved to a non-court-operated facility. See Staff Comment following Subchapter 6.900. The Family Division must comply if the circuit court orders the juvenile to remain in the Family Division-operated facility pending trial. MCL 712A.2(f); MSA 27.3178(598.2)(f).

If no juvenile facility is reasonably available and if it is apparent that the juvenile may not otherwise be safely detained, the magistrate may, without a hearing, authorize that the juvenile be lodged pending arraignment in a facility used to incarcerate adults. The juvenile must be kept separate from adult prisoners as required by law. MCR 6.907(B).

B. Places of Confinement Following Arraignment

MCR 6.909(B)(1)–(4) deal with confinement after arraignment:

> (1) Except as provided in MCR 6.909(B)(2) and in MCR 6.907(B) (see above), the juvenile charged with a crime and not released must be placed in a juvenile facility while awaiting trial, and if necessary, sentencing, rather than being placed in a jail or similar facility designed and used to incarcerate adult prisoners.
>
> (2) On motion of a prosecuting attorney or superintendent of a juvenile facility where the juvenile is detained, the magistrate or court may order the juvenile confined in a jail or similar facility designed and used to incarcerate adult prisoners upon a showing that the juvenile's habits or conduct are considered a menace to other juveniles, or the juvenile may not otherwise be safely detained in a juvenile facility.
>
> (3) The juvenile shall not be placed in an institution operated by the Family Division except with the consent of the Family Division or on order of a court as defined in these rules.
>
> (4) The juvenile in custody or detention must be maintained separately from the adult prisoners or adult accused as required by MCL 764.27a; MSA 28.886(1).

MCL 764.27a(3); MSA 28.886(1)(3), allows a juvenile or individual less than 17 years of age who is under the jurisdiction of the circuit court for committing a felony to be confined in a county jail pending trial. Prior approval of the county sheriff is required, and the juvenile must be held physically separate from adults.

MCL 712A.16(1); MSA 27.3178(598.16(1), limits placement of a child in a jail or other place of detention for adults to a period not to exceed 30 days, unless longer detention is necessary for the service of process. Thus, the court must review such a placement at least every 30 days. In addition, the court, upon motion of a juvenile or individual under 17 years of age who is subject to confinement, may, upon good cause shown, order the juvenile or individual to be confined as otherwise provided by law. MCL 764.27a(4); MSA 28.886(1)(4).

22.7 Waivers of Preliminary Examinations

The juvenile may waive a preliminary examination if the juvenile is represented by an attorney and the waiver is made and signed by the juvenile in open court. The magistrate must find and place on the record that the waiver was freely, understandingly, and voluntarily given. MCR 6.911(A).*

*See Form MC 200.

22.8 Procedures at Preliminary Examinations*

*See Monograph 5, *Preliminary Examinations* (MJI, 1992).

Preliminary examinations for juveniles in "automatic" waiver cases must follow the same procedures as preliminary examinations for adult defendants charged with criminal offenses. See, generally, MCR 6.110 and MCR 6.901(A) (the rules in Subchapter 6.900 "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders").

The people and the defendant are entitled to a prompt preliminary examination. MCR 6.110(A). The people may demand a preliminary examination even though the defendant has waived his or her right to an examination. *People v Wilcox,* 303 Mich 287, 295–96 (1942).

A. Time Requirements for Preliminary Examinations*

*See also Section 16.37 for a discussion of motions to dismiss or remand following preliminary examinations in designated cases.

Preliminary examinations must be held within 14 days after the juvenile's arraignment, less any time used by the prosecuting attorney for a special adjournment pursuant to MCR 5.935(A)(3), up to three days. Thus, the period consumed by the special adjournment, up to three days credit, must be deducted from the 14 days allowed for the conduct of the preliminary examination following district court arraignment. MCR 6.907(C)(2).

The preliminary examination must be held on the date scheduled during the arraignment unless adjourned by the court. The court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. MCR 6.110(B)(1), and *People v Weston,* 413 Mich 371, 372 (1982) (remedy is dismissal without prejudice).

If the preliminary examination is adjourned, it need not be rescheduled within the 14-day time limit. *People v Lewis,* 160 Mich App 20, 31–32 (1987).

Challenges to the timeliness of the preliminary examination or whether the requisite record showing for delay was made must be raised in a written or oral motion no later than immediately before the commencement of the preliminary examination. *People v Crawford,* 429 Mich 151, 156–57 (1987), and MCR 6.110(B)(2).

B. Rules of Evidence at Preliminary Examinations

*See also Section 16.32 for the requirements to close preliminary examinations to the public and press.

Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. Except as otherwise provided by law, the court must conduct the examination in accordance with the rules of evidence. A verbatim record must be made of the preliminary examination. MCR 6.110(C).*

If, during the preliminary examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence. If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court. MCR 6.110(D).

C. Bindover Decisions at Preliminary Examinations*

*See Section 4.13(A) for information on required testing for venereal disease and AIDS following bindover in "automatic" waiver cases.

At the conclusion of the preliminary examination, the district court judge must bind defendant over for trial if the judge determines that probable cause exists to believe that a specified juvenile violation has been committed and that defendant committed it. See MCR 6.110(E).

The definition of specified juvenile violation is quite broad and includes:

- any attempt, solicitation, or conspiracy to commit one of the specified juvenile violations;
- any lesser-included offense arising out of the same transaction as a specified juvenile violation if the juvenile is also charged with a specified juvenile violation; and
- any other offense arising out of the same transaction if the juvenile is also charged with a specified juvenile violation.

MCL 712A.2(a)(1)(E)–(I); MSA 27.3178(598.2)(a)(1)(E)–(I), MCL 600.606(2)(e)–(i); MSA 27A.606(2)(e)–(i), and MCL 764.1f(2)(e)–(i); MSA 28.860(6)(2)(e)–(i).

*See Form MC 200.

MCL 766.14(2); MSA 28.932(2), and MCR 6.911(B)(2) provide that if at the conclusion of the preliminary examination of a juvenile, the magistrate finds that a specified juvenile violation did not occur or that there is not probable cause to believe that the juvenile committed a specified juvenile violation, but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense, the magistrate shall transfer the case to the Family Division of the Circuit Court of the county where the offense is alleged to have been committed. If the case is transferred, a transcript of the preliminary examination must be sent to the Family Division without charge upon request.*

MCL 766.14(3); MSA 28.932(3) adds that transfer of the case does not prevent the Family Division from waiving jurisdiction using the "traditional" waiver procedures under MCL 712A.4; MSA 27.3178(598.4).*

*See Chapter 24.

NOTE: As noted above, the definition of "specified juvenile violation" includes lesser-included offenses and other offenses arising out of the same transaction as a specified juvenile violation if the juvenile is *charged* with a specified juvenile violation. This suggests that the district court may bind the juvenile over for trial if it finds probable cause that the juvenile committed a lesser-included or other offense rather than the charged enumerated offense. However, the district court may not bind the juvenile over for trial on these other offenses unless it also finds probable cause that the juvenile committed an enumerated specified juvenile violation. See *People v Veling*, 443 Mich 23, 31, 42–43 (1993), where the Michigan Supreme Court held that the circuit court gains jurisdiction over non-enumerated offenses only if the juvenile is also *charged in circuit court* with an enumerated offense, and the circuit court does not lose jurisdiction to sentence the juvenile if the juvenile is convicted of a lesser-included offense or other offense that is not an enumerated offense.

On the other hand, the district court may bind the juvenile over to circuit court if it finds probable cause that the juvenile committed a specified juvenile violation other than the offense charged in the district court complaint. For example, if the juvenile is charged with first-degree murder, and the district court finds probable cause that the juvenile committed second-degree murder, the juvenile could be bound over for trial since second-degree murder is also an enumerated specified juvenile violation.

22.9 Juvenile's Right to a Speedy Trial*

*See Section 18.6 for a discussion of a criminal defendant's statutory and constitutional rights to speedy trial.

Within seven days of the filing of a motion, the court must release a juvenile who has remained in detention while awaiting trial for more than 91 days. In computing the 91-day period, the court must exclude delays as provided in MCR 6.004(C)(1)–(6) and the time required to conduct the hearing on the motion. MCR 6.909(C).